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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
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Date 4/20/17

08-CR-823 (NGG)

4 UNITED STATES OF AMERICA,

United States Courthouse
Brooklyn, New York

5 Plaintiff,

6 -against-

April 20, 2017
2:00 p.m.

7 BRYANT VINAS,

8 Defendant.
9 -----x

10 *** CONTAINS SEALED CLASSIFIED INFORMATION ***

11 TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION HEARING
12 BEFORE THE HONORABLE NICHOLAS G. GARAUFI
13 UNITED STATES SENIOR DISTRICT JUDGE

14 APPEARANCES

15 For the Government:

16 ROBERT L. CAPERS, ESQ.
17 United States Attorney
18 Eastern District of New York
19 271 Cadman Plaza East
20 Brooklyn, New York 11201
21 BY: RICHARD M. TUCKER
22 DAVID KESSLER
23 SETH DuCHARME
24 Assistant United States Attorneys

SPECIAL AGENT FARBOD AZAD
INTELLIGENCE ANALYST ERIKA DAY
JOINT INTELLIGENT TASK FORCE

25 For the Defendant:

STEVE ZISSOU & ASSOCIATES
42-40 Bell Boulevard, Suite 302
Bayside, New York 11361
BY: STEVE ZISSOU, ESQ.

For the Defendant:

LAW OFFICES OF MICHAEL K. BACHRACH
276 Fifth Avenue, Suite 501
New York, New York 10001
BY: MICHAEL K. BACHRACH, ESQ.

Court Reporter:

LINDA D. DANIELCZYK, RPR, CSR, OCR
Phone: 718-613-2330 Fax: 718-804-2712
Email: LindaDan226@gmail.com

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2

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1 (Continued from open court.)

2 THE COURT: Can we have everyone appearance here?

3 Let's get everybody's appearance. Start with the government
4 and everybody else.

5 MR. TUCKER: Yes, Your Honor.

6 So for the government, Your Honor, Rich Tucker,
7 David Kessler and Seth DuCharme. With us again in the back of
8 the room is Special Agent Farbod Azad, and Intelligence
9 Analyst Erika Day from the Joint Intelligent Task Force.

10 THE COURT: Welcome to both of you.

11 All right. And?

12 MR. ZISSOU: Oh, Steve Zissou and Michael Bachrach
13 again for Mr. Vinas, who's not present.

14 THE COURT: All right. And he waived his
15 appearance.

16 MR. ZISSOU: Yes, Your Honor.

17 THE COURT: Yes, he wouldn't have his appearance any
18 way.

19 MR. ZISSOU: Yes, Judge.

20 THE COURT: All right, so the issue, I suppose, is
21 two redacted portions of the government's sealed submission to
22 the Court in connection with sentencing.

23 MR. TUCKER: Classified submission.

24 THE COURT: Classified submission.

25 MR. ZISSOU: There's the letter we submitted asking

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1 questions.

2 THE COURT: Yes, tell me which letter we're talking
3 about.

4 MR. ZISSOU: Mr. Bachrach will describe it.

5 MR. BACHRACH: This letter --

6 MR. ZISSOU: It's dated, what date it is?

7 THE COURT: March 23rd.

8 Do you have it?

9 MR. TUCKER: I do, Your Honor.

10 MR. BACHRACH: This letter --

11 THE COURT: I think we have nine items.

12 MR. BACHRACH: Correct, Your Honor.

13 MR. ZISSOU: The government responded on April 3rd.
14 That's their classified response.

15 THE COURT: So why don't we just -- it would be
16 helpful for me if we just went through the nine items.

17 MR. TUCKER: Sure.

18 THE COURT: And we have the items and the response,
19 but why don't we put it all, you know, as long as we're here
20 together today --

21 MR. ZISSOU: Sure.

22 THE COURT: -- put it into the record.

23 Why don't I just read the item and then we can
24 discuss it.

25 MR. ZISSOU: Fair enough.

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4

1 THE COURT: A March 23rd, 2017 letter from the
2 defense under seal, presumptively classified.

3 The first issue is, one: With respect to any of the
4 information provided [REDACTED] by Mr. Vinas, including
5 information that is specifically referenced [REDACTED]
6 as having been, quote, assessed to be historical or potential
7 leads to Usama bin Laden and Ayman al-Zawahiri, did any
8 such information assist the United States in obtaining the
9 location of Usama bin Laden or Ayman al-Zawahiri. And so
10 on that one --

11 MR. ZISSOU: Their answer is on page 2 of their
12 letter.

13 THE COURT: Their letter. Thank you.

14 In answer to that question, the answer was "no". I
15 mean I'm not going to read it. The answer's "no". So that
16 question was answered.

17 MR. ZISSOU: Yes.

18 THE COURT: Number two requests: With respect to
19 the above, did any of such information assist in the capture
20 or death of Usama bin Laden or Ayman al-Zawahiri, and the
21 answer was to that, -and the government's response was "no".

22 MR. TUCKER: Correct, Your Honor.

23 THE COURT: Right?

24 MR. BACHRACH: Yes, Your Honor.

25 THE COURT: Third question: Please provide an

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1 estimate of the number of acts of terrorism targeting people
2 or places within the United States that were disrupted as a
3 result of the information provided by Mr. Vinas to the United
4 States, including the FBI, the DOJ, and the IC and/or to,
5 quote, U.S. foreign liaison partners, end quote.

6 The third bullet in the response, is that responsive
7 to that?

8 MR. TUCKER: It is, Your Honor.

9 THE COURT: Well, let me just read it.

10 The response in the April 3rd; is it?

11 MR. TUCKER: Yes, Your Honor.

12 THE COURT: Letter of the government is, quote, the
13 terrorist plot disrupted as a result of the defendant's
14 cooperation as set forth in the government's previously filed
15 submissions, end quote.

16 So that was answered. All right. Okay.

17 Then we move on to number four through nine.

18 MR. TUCKER: Yes, Your Honor.

19 THE COURT: And as to those, as to all of them, the
20 government states that with respect to the remaining
21 interrogatories contained in your March 23, 2017 submission,
22 the government rests on its prior submissions. That's what
23 you answered.

24 MR. TUCKER: Yes, Your Honor.

25 THE COURT: Your answer was you didn't specifically

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6

1 answer each one, you simply provided a catch-all answer.

2 MR. TUCKER: Yes, Your Honor.

3 MR. ZISSOU: That's what they did.

4 THE COURT: All right. And is that the subject of
5 this meeting?

6 MR. BACHRACH: Yes, Your Honor. That and the
7 redacted information. And the next question is the overlap.

8 THE COURT: Well, let me just read them then.
9 Because it's helpful to me to read them. I don't know about
10 you, but it helps me.

11 Number four: Please provide an estimate of the
12 number of acts of terrorism targeting people or places outside
13 the United States that were, quote, disruptive, end quote, as
14 the result of the information provided by Mr. Vinas to the
15 United States, including the FBI, the DOJ, and the IC. I'm
16 sorry, what is IC?

17 MR. BACHRACH: International community.

18 MR. TUCKER: Intelligence community.

19 MR. ZISSOU: Intelligence community.

20 THE COURT: Is that the domestic intelligence
21 community or the intelligence community of the world?

22 MR. TUCKER: The way that we use the term, Your
23 Honor, it would be American intelligence agencies.

24 THE COURT: For my information.

25 MR. BACHRACH: And I'm quoting one of their

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1 submissions, Your Honor.

2 THE COURT: All right. And/or to, quote, U.S.
3 foreign liaison partners, end quote.

4 So your response to that is you've already provided
5 that to the extent that you have such information.

6 MR. TUCKER: That's correct, Your Honor.

7 THE COURT: Five: Was information provided by
8 Mr. Vinas relied upon by the United States for military
9 purposes; if so, please provide a summary. And same answer.

10 MR. TUCKER: Correct, Your Honor.

11 THE COURT: Six: Was information provided by
12 Mr. Vinas relied upon by the United States in relation to
13 drone strikes of specific targets; if so, please provide an
14 estimate of the number of strikes that were launched that
15 relied upon such information, as well as an estimate of the
16 number of strikes that were successfully completed as a result
17 of such information. You provided the same answer.

18 MR. TUCKER: Yes, Your Honor.

19 THE COURT: Seven: Has the IC been able to
20 successfully infiltrate al-Qaeda as the result of the
21 information provided by Mr. Vinas. You have the same answer.

22 MR. TUCKER: Yes, Your Honor.

23 THE COURT: Number eight: Has the IC been able to
24 successfully infiltrate any other terrorist organization,
25 including but not limited to ISIS, as a result of the

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8

1 information provided by Mr. Vinas. Same answer.

2 MR. TUCKER: Yes, Your Honor.

3 THE COURT: Nine: Please identify whether the
4 answer to any of the questions listed above is revealed in the
5 paragraphs that are redacted in the government's classified
6 letter [REDACTED] And you give the same answer to
7 that, although that answer would not be found in your
8 submissions.

9 MR. TUCKER: It's a fair point, Your Honor. I guess
10 what I mean by that is the basis for not providing that answer
11 would be the same basis for why we redacted those paragraphs
12 in the first instance.

13 THE COURT: Oh, okay. So it really doesn't apply to
14 paragraph 9.

15 MR. TUCKER: I think that's right, Your Honor.

16 THE COURT: But what applies to paragraph 9 is the
17 redaction of the two items in the other letter.

18 MR. TUCKER: The government's classified submission.

19 THE COURT: The classified submission, which we
20 have, I think.

21 THE LAW CLERK: You have it, Your Honor.

22 THE COURT: Yes, let me just have that.

23 MR. BACHRACH: I mean the original, I'm sorry.

24 THE COURT: Right. I also have the redacted
25 version.

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1 MR. BACHRACH: Yes, Your Honor.

2 THE COURT: Let's just not confuse ourselves. Take
3 a look.

4 (Pause.)

5 THE COURT: All right. So what I'm being told about
6 paragraphs 4 through 8 is you already -- the government's
7 position is you have the information. That was already
8 provided to you. Is that right?

9 MR. TUCKER: Well, that's certainly true, Your
10 Honor, I think --

11 THE COURT: But it's not provided in the form that
12 it's requested. I think that's the difference. That what
13 you're saying is that in the prior submissions to the defense,
14 the information that's requested is somewhere found within
15 that material.

16 MR. TUCKER: I think that's right, Your Honor. I
17 would just modulate that answer slightly to say that certain
18 of the information requested may or may not have been provided
19 to the Court but not to defense counsel.

20 And I need to be cautious here because the defense
21 does not have authorization to have answers to certain
22 questions in there. The Court does. So the --

23 THE COURT: But how would I know? How would they
24 know which questions they are?

25 MR. TUCKER: They wouldn't, Your Honor. But I'm

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1 happy to highlight that to the Court outside the presence of
2 defense counsel.

3 THE COURT: Well that doesn't help me.

4 MR. TUCKER: Your Honor --

5 THE COURT: Your point in the other room was that
6 they don't need some of this material in order to make their
7 arguments on sentencing.

8 MR. TUCKER: Absolutely, Your Honor.

9 THE COURT: And their position is that sentencing in
10 this situation is an extension of the process of pretrial and
11 discovery and preparation for trial and material that would be
12 in the nature of Brady material, were there to be a trial, and
13 that it's a more expansive view of Brady than you're willing
14 to agree to.

15 MR. TUCKER: I agree with that, Your Honor.

16 MR. BACHRACH: Your Honor, if I may add.

17 THE COURT: Of course.

18 MR. BACHRACH: I would actually take it a little bit
19 further than that.

20 THE COURT: I'm sure you would.

21 MR. BACHRACH: I would say that since, as I
22 explained in my letter, since Brady is itself a case dealing
23 with penalty phase mitigation for sentencing, which is
24 analogous to sentencing in a noncapital case, since the issue
25 that was found reversible or found to have been the problem

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1 with Brady originally, was the failure to turn over evidence
2 that would mitigate favorably towards the defendant in
3 relationship to what his punishment should be. And that is
4 analogous to what his sentence should be.

5 So Brady is not simply confined to pretrial
6 proceedings, it may be that, that's where it's most commonly
7 cited, but it is certainty not what it's confined to. It does
8 apply to sentencing as well. So information relevant to
9 sentencing under 3553(a) or 3661, either one of those, it
10 would be applicable. And from our perspective, Your Honor, I
11 think Brady itself is pretty clear on that point.

12 THE COURT: And the government's position -- just
13 share with me the government's position on what might be a
14 balancing of the equities. I don't know that it would apply
15 in Brady, if Brady is applicable, but how does the government
16 square that concern of the defense and the rights of a
17 defendant to have an appropriate set of arguments for a
18 sentencing with the issue of national security and so forth.

19 MR. TUCKER: Right. Well, I think a couple of
20 important framing points, Your Honor.

21 The first is I think Mr. Bachrach goes far too far
22 in his extension of Brady. If we're talking about Brady from
23 the standpoint of disclosing mitigating details about a
24 defendant, I think that's very different than providing
25 information about consequences or possible outcomes attenuated

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12

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1 and stemming from a defendant's cooperation. So I simply
2 don't acknowledge, and Mr. Bachrach cites to no case to
3 support the proposition that the defense would be entitled to
4 that information.

5 Now that said, Your Honor, the government has, in
6 good faith, in a manner consistent with the cooperation
7 agreement, has endeavored to provide the Court with any and
8 all details available to it about the nature of the
9 substantial assistance provided by the defendant. And in so
10 doing, we have provided a very small ex parte portion of our
11 classified submissions. And Your Honor knows, as Your Honor's
12 been practicing and on the bench far longer than I have
13 been --

14 THE COURT: Who has been?

15 MR. TUCKER: You have, Your Honor.

16 THE COURT: We had a problem with that yesterday in
17 another matter.

18 MR. ZISSOU: Yes, we read.

19 MR. TUCKER: But Your Honor knows that it's a common
20 practice in this district to make ex parte submissions in
21 support of 5K applications, and we've done it here in the
22 unclassified context as well, where we described cases that
23 are pending, where we've charged individuals based on
24 information provided by the defendant in the course of its
25 cooperation. And defense counsel doesn't quibble with that

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1 because they understand that it would be ridiculous to suggest
2 that they would be entitled to know who is charged in an
3 ongoing investigation.

4 It's the same idea, Your Honor. This is positive
5 information about the defendant. We made that clear in our
6 footnote. It's information that the Court should consider in
7 evaluating sentence. But the Court doesn't need the defense
8 counsel to comment on this information to understand its
9 import. I apologize, Your Honor.

10 THE COURT: No, go ahead. No, you finish.

11 MR. TUCKER: I would just say: Only the government,
12 and the law is clear on this, only the government is in a
13 position to assess whether substantial assistance was granted.
14 I mean obviously it's such that it was.

15 But we are the ones who can explain to the Court
16 what the nature of that substantial assistance is, and we've
17 done that. The information is a incredibly small subset of
18 the information not provided to the defense is simply, Your
19 Honor, so sensitive that the stakeholders would not let us
20 provide it.

21 THE COURT: Did you want to add something,
22 Mr. Kessler?

23 MR. KESSLER: No.

24 THE COURT: No? Okay, you had your chance.

25 Let me just say, and I'm not sure how far I can go

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1 in saying this -- well, let me ask this: You heard
2 Mr. Zissou's comments in public just now about the scope and
3 significance of his client's assistance. If I were holding a
4 sentencing proceeding, would you be taking issue with that?

5 MR. TUCKER: As a practical matter, probably not,
6 Your Honor. I think Mr. Zissou will be able to make his
7 full-throated argument in favor of his client, and I think
8 that frankly, Your Honor, the government would be doing the
9 same.

10 THE COURT: Well, would it be inappropriate for me
11 to give, based on having read the material that is the subject
12 of this discussion, at least an overview, not of any of the
13 details, any of the facts, but of the significance that the
14 Court believes that this material would engender at a
15 sentencing proceeding, or is it premature for me to do that?

16 MR. ZISSOU: I certainly don't think it's premature.

17 MR. TUCKER: I don't think it's premature, Your
18 Honor, I think the Court can definitely do that. But the
19 Court knows what's under those redactions.

20 THE COURT: Yes, but the defense doesn't, and
21 obviously the defense has a concern that they have articulated
22 that this might be helpful -- knowing these facts might be
23 extremely helpful in formulating their arguments for a
24 particular proposed sentence, let's say. And I'm not sure
25 whether they're right about -- and I'm not going to comment

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1 today on whether they're right about their Brady argument, but
2 I can understand why in a case as charged, as serious and
3 having as much scrutiny and attention being given to it as
4 this in the environment we live in, that they would want to be
5 able to make the strongest possible argument for their client,
6 who is clearly in a very difficult spot in terms of his
7 existence, having done what he did before and after his
8 arrest.

9 So the reason I ask the question is, perhaps it's
10 possible to put this whole discussion to rest by the Court, at
11 least giving an overview of its view, its own view of the
12 significance of this information in terms of sentencing, which
13 could put the -- or not put the defense at ease about the
14 significance of this material without providing the material,
15 which I would agree, having read it, is extremely sensitive.
16 So the only way the defense could get it is if they can win on
17 their Brady argument, all right?

18 I trust them to follow the rules about not
19 disclosing information, but I can also understand the reason
20 why the government has redacted these particular short phrases
21 in the submission, in the classified submission. So that's my
22 question. I mean is this a problem for the government?

23 MR. TUCKER: No, I don't think so, Your Honor.

24 THE COURT: Well, I've read the materials and it's
25 clear to the Court that the redacted material is extremely

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16

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1 helpful to the Court in a very positive way in how it looks at
2 the defendant's cooperation, that this is extremely
3 significant and very positive in any argument that the defense
4 makes in connection with the best possible sentencing results
5 for the defendant.

6 So I don't know how far we want to take this, but
7 everything that Mr. Zissou said reflects what's in this
8 redacted material. The Court accepts the redacted material as
9 being bona fide and accurate, and also be extremely sensitive,
10 and I don't know that you need any more than that, but you're,
11 Mr. Zissou, Mr. Bachrach, you're the defendant's attorneys, if
12 you want to pursue the arguments that you made in your
13 extensive submission of today, that is your right and I can
14 rule on it, obviously, but you should understand that I think
15 that the materials that are redacted are extremely helpful to
16 your case and the Court -- and actually it was very helpful
17 for you to raise these issues so that I would focus on them.

18 If the idea, among others, was that I should take a
19 special look, I've taken that special look and I'm very
20 impressed by what the government has put forward. So it's
21 really up to you, and I'm not going to tell you what to do
22 now, you can tell me. If you want to pursue the application,
23 that is your right and I'll rule on it, but I think it's very
24 clear that there's some very beneficial materials in there for
25 your client.

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17

1 MR. ZISSOU: So, Judge, I think what we'll do is
2 we're going to see the client tomorrow. Again we'll be
3 spending some more quality time with him. We will certainly
4 run this by him. As Your Honor knows, he's eager to proceed,
5 as is the Court and the parties. So we will speak to him. If
6 we think we need anything further, then we will let the Court
7 know, but I think Your Honor should probably think about
8 sentencing and, again, if I'm wrong tomorrow and we decide
9 differently then we'll let Your Honor know forthwith about
10 what the answer might be. Of course we don't have our phones
11 so we can't give you dates. We have to go back into the
12 courtroom to get them.

13 THE COURT: Well, we can do that. We're not far
14 away from the courtroom. But I would like to schedule
15 sentencing, if I could.

16 Is that agreeable to the government?

17 MR. ZISSOU: Of course, yes.

18 MR. TUCKER: Yes.

19 MR. BACHRACH: I'm just going to put this on the
20 record now, if it would be possible to get an expedited review
21 of this sealed transcript for public release, to the extent
22 that it can be, any portions of today's proceedings can be
23 declassified, so that we can rely upon the public submission.

24 THE COURT: Why don't you work that out, if it's
25 possible.

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18

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1 MR. TUCKER: We'll take a look, Your Honor.

2 MR. ZISSOU: Sure.

3 THE COURT: I think we're well on our way here and I
4 would very much like to sentence the defendant and move on.

5 MR. BACHRACH: Understood.

6 THE COURT: And however I sentence the defendant, he
7 has agreed to continue to cooperate with the government.

8 MR. ZISSOU: No question.

9 MR. BACHRACH: Yes, Your Honor.

10 THE COURT: Let me just ask this, as long as we're
11 sitting in private. Has the defendant's cooperation continued
12 full throated over these nine years?

13 MR. TUCKER: Your Honor, I think the answer to that
14 would be nearly, but not entirely, and we addressed this in
15 our letter a little bit. The hiccup in the cooperation
16 related to his potential testimony in a case that was current
17 in September.

18 THE COURT: I think you wrote to me. Is that the
19 one you wrote to me about?

20 MR. TUCKER: I think I did, Your Honor. It's in our
21 file. I think there's a bit of a tension between what I think
22 is Mr. Zissou's accurate characterization of his willingness
23 to cooperate with sort of his state of mind in terms of like
24 whether his mind is ready to be fully cooperative.

25 THE COURT: Well, there's also -- if he's anxious to

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19

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1 be sentenced.

2 MR. TUCKER: Right.

3 THE COURT: If he's sentenced now, does it -- what
4 is your view, rather, of whether that would have any affect on
5 his willingness and ability to cooperate in a proceeding later
6 on.

7 MR. TUCKER: I'm reluctant to speculate on that. I
8 would need to speak to Mr. Bachrach.

9 MR. ZISSOU: It won't undermine it whatsoever. Even
10 if Your Honor would impose a sentence that's as close to time
11 served, he has to go into the WITSEC pro. He's asked to
12 continue in WITSEC, that's a 120-day process minimally. Even
13 if Your Honor were to impose a sentence that was close to time
14 served, he would be still in custody for at least another 90
15 days so, and probably longer than that, probably three or four
16 months. So it's not going to make a difference. He
17 understands the cooperation agreement obliges him to cooperate
18 fully and he will continue to do so.

19 His concern is the passage of time, because early
20 on, let's call it a misunderstanding, there were, as there
21 often are, suggestions about how long it would be, two years,
22 three years, five years, and before you know it it's almost a
23 decade and that leads to, given the passage of time and where
24 he's been housed, it leads to --

25 THE COURT: Frustration.

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20

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1 MR. ZISSOU: Yes.

2 MR. TUCKER: And distraction I think, Your Honor.

3 THE COURT: Well that's understandable. And what
4 you know and I know, but he certainly would never know, is
5 that it is not a unique circumstance to a terrorism case, it
6 has to do with any kind of cooperation of a --

7 MR. ZISSOU: Sure.

8 THE COURT: -- serious nature --

9 MR. ZISSOU: Sure.

10 THE COURT: -- where there are proceedings that are
11 unearthed over time and --

12 MR. ZISSOU: Sure.

13 THE COURT: -- and assistance is needed for a good
14 period of time.

15 MR. ZISSOU: None of us were here at the time so --

16 THE COURT: Who wasn't here?

17 MR. BACHRACH: The attorneys.

18 THE COURT: Oh, yes, I was here.

19 MR. ZISSOU: Mr. Tucker, you were here.

20 THE COURT: I was here. I was here on day one.

21 MR. ZISSOU: I wasn't. All I can tell you --

22 THE COURT: Well, I was here in my business suit
23 when the prosecutors came in with the defendant and the FBI
24 all wearing flak jackets and helmets when he was arraigned. I
25 was the only one -- and the court reporter who were basically

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21

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1 unprotected.

2 MR. ZISSOU: He was certainly somebody who needed to
3 be protected, I'll tell you that. Still does and still will
4 for the rest of his life.

5 THE COURT: But I was here on day one.

6 MR. ZISSOU: Couple of things have combined to make
7 this better. One is Your Honor having regular status
8 conferences. That really helped us. And then I think
9 Mr. Tucker stepped in and directly gave the client a choice:
10 Either you can wait or you can be sentenced, we won't stand in
11 your way, you've done a lot for us, but understand I have to
12 tell the Judge that Mr. Tucker did that, I have no --

13 THE COURT: Right, and that's why we're here now.

14 MR. TUCKER: Exactly.

15 THE COURT: Okay, that's fine. All right.

16 So is there anything else for this sealed
17 proceeding?

18 MR. ZISSOU: Not from the defense, Your Honor.

19 MR. TUCKER: Not from the government, Your Honor.

20 THE COURT: All right, the transcript is sealed, and
21 is there anything about it that needs to be -- anything else I
22 need to say about it?

23 MR. ZISSOU: No, Judge, other than --

24 THE COURT: And maybe made available to the parties,
25 the attorneys of record, only.

LINDA D. DANIELCZYK, RPR, CSR
Official Court Reporter

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22

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1 MR. ZISSOU: Your Honor, can I have the reporter
2 prepare the public portion of the transcript?

3 THE COURT: Let me say it.

4 MR. ZISSOU: Thank you, Judge.

5 THE COURT: For review and the possible preparation
6 of a redacted public portion, if it is agreeable to both
7 sides.

8 MR. ZISSOU: And just so we -- insofar as the
9 previous proceeding in open court, would Your Honor order
10 those minutes produced as well?

11 THE COURT: Yes, the minutes of the public
12 proceeding, which took place before this proceeding, will be
13 completed, the transcript will be completed and made available
14 to the parties.

15 MR. ZISSOU: Thank you.

16 MR. BACHRACH: Thank you.

17 THE COURT: All right, so what do we need to go out
18 and do now?

19 MR. ZISSOU: Do you want to just pick a date for the
20 sentence?

21 THE COURT: Let's go out and pick a date for the
22 sentence. All right, you all will get your cell phones back
23 and your iPhones.

24 (Whereupon, the matter was concluded.)

25 * * * * *

I certify that the foregoing is a correct transcript from the
record of proceedings in the above entitled matter.

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